THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.10.2007

\+ **I.A. Nos.7295/2006 & 2357/2007, 2358/2007 & 2359/2007 in CS(OS) 2035/2002**

M/S TINNA OVERSEAS LIMITED ... Plaintiff

- versus -

M/S EMIRATES AIRLINES LIMITED & ANOTHER ... Defendants

Advocates who appeared in this case:
For the Plaintiff : Mr M. Dutta
For the Defendant No.1 : Mr N.S. Vashisth with Ms Ritu Singh

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. This order shall dispose of the above mentioned four applications. IA 2357/2007 is an application for amendment of IA 7295/2006 which has been filed under Order 9 Rules 7 and 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC'). This application seeks to carry out minor amendments and the same is allowed. The amended application is taken on record.

2. IA No.7295/2006 and 2358/2007 are taken up together. As mentioned above, IA 7295/2006 is an application under Order 9 Rules 7 and 13 for setting aside the *ex parte* decree dated 14.12.2005 as also the *ex parte* order dated 23.01.2004. These applications have been filed on behalf of the defendant No.1. IA 2358/2007 is an application under Section 5 of the Limitation Act for condoning the delay in filing IA No.7295/2006.

3. The summons issued to the defendant No.1 was served upon defendant No.1 on 28.02.2003. Since nobody appeared on behalf of the defendant No.1, this court passed an order directing the suit to proceed *ex parte* as against the said defendant on 23.01.2004. As per the defendant No.1, the reason for non-appearance on 23.01.2004 as well as on other dates was that the matter being a cargo claim arising out of Airway Bills issued at Mumbai had been entrusted to the Cargo Manager, Mumbai of the defendant No.2, namely, Mr Rettiganti. As per the said defendant No.1, there was correspondence between the plaintiff and the said Mr Rettiganti. It is also submitted that at the relevant time Mr Rettiganti was suffering from cancer and he eventually died on

25.10.2003. It was submitted on behalf of the defendant No.1 that in all probability, Mr Rettiganti was unable to give due attention to this matter on account of his ill health. Even after his death on 25.10.2003, no steps were taken by the defendant No.1 to put in appearance before this court or to take appropriate steps for setting aside of the decree within the limitation period of 30 days as the file and other related documents pertaining to this matter were not found at Mr Rettiganti's work station after his death. It is, therefore, submitted that his successor remained unaware of the pendency of this matter till the defendant No.1 received a copy of the *ex parte* decree at its Mumbai office in the first week of June, 2006, which was presumably sent by the plaintiff. It was also submitted that as soon as the copy of the *ex parte* decree was received by the defendant No.1, steps were taken for setting aside of the same.

4. Reliance was placed by the defendant No.1 on a decision of a learned single Judge of this court in the case of ***Indradhanush T.V. Pvt. Ltd. (M/s.) v. National Film Development Corporation*****: 2006 III AD (Delhi) 104**. At the outset, I may state that this decision would not be applicable and / or relevant to the present case inasmuch as it is a decision rendered in respect of Order 8 Rule 1 CPC, whereas the present

case is one under Order 9 Rules 7 and 13 CPC. A plain reading of Order 9 Rule 13 would indicate that an *ex parte* decree may be set aside if the court is satisfied that the summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. In the present case, it is an admitted position that the summons had been duly served, therefore, it is incumbent upon the defendant No.1 to establish and satisfy this court that the defendant No.1 was prevented by sufficient cause from appearing when the suit was called on for hearing. The only reason given by the defendant No.1 is that when the summons were received, the Cargo Manager (Mr Rettiganti) was suffering from cancer and that he ultimately died on 25.10.2003. And that, it is because of this that the defendant was prevented from appearing before this court when the suit was called on for hearing.

5. In ***G.P. Srivastava v. R.K. Raizada and Others*****: 2000 (3) SCC 54**, the Supreme Court observed that unless sufficient cause is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an *ex parte* decree. However, the Supreme Court also observed that the words "was

prevented by any sufficient cause for appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guideline can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. It was also pointed out that "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when *ex parte* proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier.

6. The facts of the present case need to be considered in the context of these observations. Admittedly, the defendant No.1 was served with the summons in February, 2003. Mr Rettiganti, the alleged Cargo Manager expired on 25.10.2003. The date on which the court

passed an order for proceeding *ex parte* against the said defendant was 23.01.2004. The suit itself was decreed on 14.12.2005 and the application for setting aside the *ex parte* decree was filed on 01.07.2006. Apart from the purported explanation of Mr Rettiganti's ill health and ultimate death, there is no explanation forthcoming during the period February, 2003 to 01.07.2006. The defendant No.1 is a well-established international Airline and it cannot be expected that when the summons have been duly served, only one person would be in the know of such service of summons and that he would not act upon the same at all. The death of Mr Rettiganti is unfortunate as is the death of any person, but his death cannot be cited as an excuse for non-appearance. It is also not established as to how Mr Rettiganti alone was looking after this case. The explanation sought to be given by the defendant No.1 does not at all appear to be plausible and is also bereft of particulars. The submission made by the learned counsel for the defendant No.1 that, in all probability, Mr Rettiganti was unable to give due attention to the matter on account of his ill health is also nothing but surmise and conjuncture. The fact of the matter is that the summons were duly served and that the defendant has been unable to satisfy this court that it was prevented by sufficient cause from appearing before this court on the date on which

the suit was called on for hearing. This being the case, this court has no power to set aside the *ex parte* decree. Accordingly, IA Nos.7295/2006 & 2358/2007 are dismissed. Consequently, IA No.2359/2007 is also liable to be dismissed and it is so dismissed.

BADAR DURREZ AHMED
(JUDGE)

October 23, 2007
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